UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADMINISTRATIVE LAW JUDGE PAUL BOGAS

Cascades Containerboard Packaging-Niagara, A Division of Cascades Holdings, US, Inc.	Case 03-CA-242367 03-CA-243854 03-CA-248951
and	
International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO	

POST-HEARING BRIEF OF CASCADES CONTAINERBOARD PACKAGING – NIAGARA, A DIVISION OF CASCADES HOLDINGS US, INC.

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INTRODUCTION

Cascades Containerboard Packaging – Niagara, A Division of Cascades Holdings, US, Inc., the Respondent in the above captioned consolidated cases (the "Employer" or "Respondent") respectfully submits, by and through its undersigned Counsel, this Post-Hearing Brief, following a Hearing conducted before Administrative Law Judge Paul Bogas ("Your Honor") in Buffalo, New York, from December 3 through 5, 2019.

PROCEDURAL HISTORY

The International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO, the Charging Party (the "Union"), was certified in approximately April of 2019 as the collective bargaining representative of the approximately 115 production and maintenance employees of the Employer (the "Bargaining Unit Employees"), the operator of a cardboard paper mill located in Niagara Falls, New York. (Tr. 8, 31.) [1]

On May 30, 2019, the Union filed an Unfair Labor Practice Charge with Region Three (the "Region" or "Region Three") of the National Labor Relations Board (the "Board") in Case No. 03-CA-242367 (the "First Charge"), alleging that the Employer had violated §§ 8 (a) (1) and (5) of the National Labor Relations Act

[1] General Counsel Exhibits will be notated "G.C. Ex. __". Respondent Exhibits will be notated "R. Ex. __". Joint Exhibits will be notated "J. Ex. __". References to the transcript of the Hearing will be notated "(Tr. __)".

(the "Act") by unilaterally implementing layoffs without bargaining either the decision or the effects of the layoff with the Union, in retaliation for the Bargaining Unit Employees' election of the Union. G.C. Ex. 1(a).

On June 25, 2019, the Union filed another Unfair Labor Practice Charge with Region Three in Case No. 03-CA-243854 (the "Second Charge"), alleging that the Respondent had violated §§ 8 (a) (1), (3), and (5) the Act by unilaterally "altering employees' profit share in retaliation for" choosing to be represented by the Union, and § 8(a) (1) of the Act by virtue of statements purportedly made by Production Supervisor Robert Pozzobon. G.C. Ex. 1(c).

On September 27, 2019, the Union filed an additional Unfair Labor Practice Charge with Region Three in Case No. 03-CA-248951 (the "Third Charge"), alleging that the Respondent had violated §§ 8 (a) (1), (3) and (5) the Act by refusing to furnish information concerning the Respondent's "profit-sharing system"; ceasing display of the Respondent's "profit sharing formula" at the Employer's facility; and subcontracting work historically performed by bargaining unit employees. G.C. Ex. 1(e). On October 3, 2019, the Union amended its Third Charge to remove the allegation that § 8 (a) (3) of the Act had been violated G.C. Ex. 1(g).

On October 30, 2019, the Regional Director for Region Three (the "Regional Director") issued an "Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing" (the "Second Consolidated Complaint"), whereby

the First Charge, Second Charge, and Third Charge were consolidated and scheduled for a Hearing on December 3, 2019. [2] G.C. Ex. 1(s). The Second Consolidated Complaint alleged that the Employer had violated § 8 (a) (1) of the Act by way of comments allegedly made to employees by Pozzobon [G.C. Ex. 1(s), ¶¶ 6 (a), (b) and (c) and (10)]; §§ 8 (a) (1) and (3) of the Act by discontinuing the posting of "company profit sharing information" [G.C. Ex. 1(s), ¶¶ 8 (a), (f) and (11)]; §§ 8 (a) (1) and (5) of the Act by laying off employees in May 2019 [G.C. Ex. 1(s), ¶¶ 8 (b), (c), (g), (h) and (12)]; §§ 8 (a) (1) and (5) of the Act by "subcontracting bargaining unit work [G.C. Ex. 1(s), ¶¶ 8 (d), (g), (h) and (12)]; §§ 8 (a) (1), (3), and (5) of the Act by "altering" the employee profit sharing plan [G.C. Ex. 1(s), ¶¶ 8 (e), (f), (g), (h), (11) and (12)]; and §§ 8 (a) (1) and (5) of the Act by failing to provide the Union with information it had requested concerning profit sharing [G.C. Ex. 1(s), ¶¶ 9 (a), (b) and (c) and (12)]. G.C. Ex. 1(s). On November 12, 2019, the Employer filed a timely Answer to the Second Consolidated Complaint, which denied the material

[2] On August 6, 2019, the Region issued a "Complaint and Notice of Hearing" in connection with the First Charge, to which the Respondent filed a timely Answer on August 22, 2019. G.C. Exs. 1(i), 1(m). The Complaint and Notice of Hearing did not include the allegation, contained in the First Charge, that the layoffs conducted by the Employer had violated § 8 (a) (3) of the Act. G.C. Ex. 1(i). On October 1, 2019, the Region issued an "Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing", consolidating the First Charge and the Second Charge, to which the Respondent filed a timely Answer on October 15, 2019. G.C. Exs. 1(p), 1(r).

allegations of the Second Consolidated Complaint. G.C. Ex. 1(u). On December 2, 2019, the Employer timely filed an Amended Answer to the Second Consolidated Complaint, which again denied the material allegations of the Second Consolidated Complaint and set forth affirmative defenses to the Second Consolidated Complaint.[3] G.C. Ex. 1(x-1). Specifically, the Respondent averred that, *inter alia*: the General Counsel lacked the authority to issue the Second Consolidated Complaint with regard to the profit sharing plan and information request allegations; that the profit sharing and information request allegations and any remedy related thereto conflicted with Canadian law; that the profit sharing plan was a discretionary gift concerning which the Respondent did not have any duty to bargain with the Union; and that the Respondent did not control any "alteration" of the profit sharing plan or the provision of the profit sharing plan, and thus could not have violated the Act. G.C. Ex. 1(x-1).

Thereafter, the Record was opened before Your Honor on December 3, 2019, and closed on December 5, 2019. (Tr. 5, 493)

[3] On November 18, 2019, the Second Consolidated Complaint was amended to allege that the Union had requested information from the Employer in writing on or about August 16, 2019, and to attach the Union's written request as an Exhibit to the Second Consolidated Complaint. G.C. Ex. 1(v). The Respondent's December 2, 2019 Amended Answer admitted the additional allegations contained within the amendment. G.C. Ex. 1(x-1).

SUMMARY OF THE EVIDENCE

I. Background Information

The Employer operates a cardboard paper mill located in Niagara Falls, New York. (Tr. 8) The Employer's parent company is Cascades, Inc., which is a Canadian corporation that is headquartered in Kingsey Falls, Canada ("Cascades, Inc."). (Tr. 423; 486) [4] Cascades, Inc. is divided into three sectors: tissue, specialty products group (or "SPG") and containerboard. (Tr. 422) The Employer's mill is part of the containerboard sector, which is comprised of six cardboard paper mills (of which the Employer is one) and approximately thirty "box plants." (Tr. 422-423) The tissue and SPG sectors are similar in size to the containerboard sector. (Tr. 423)

Cascades, Inc. is the entity which administers a profit sharing plan for employees of all three sectors, based upon each sector's profitability in a given period. (Tr. 423) All of the information about the profit sharing plan is retained by Cascades, Inc. in Quebec, Canada. (Tr. 480-482) Similarly, Cascades, Inc. possesses authority and control over decisions made by the individual mills within each sector – for example, concerning the publication and availability of sensitive information to employees of the mills. (Tr. 352)

[4] The Respondent respectfully requests that Your Honor take judicial administrative notice that information about the corporate entities owned and operated by Cascades, Inc. is provided on its website at www.cascades.com. See Tr. 487.

As noted, *supra*, the Union was certified as the collective bargaining representative of the Bargaining Unit Employees in approximately April of 2019. (Tr. 8, 31, 110-111 315.)[5] The Union's organizing drive at the Employer's facility began in August of 2018. (Tr. 202) After the Union was certified, the parties began negotiating an initial collective bargaining agreement in July 2019, and had met for six or seven bargaining sessions between July 2019 and December 3, 2019, but, as of the time of trial, had not yet reached a collective bargaining agreement. (Tr. 31-32)

II. The June 2019 Profit Sharing Payments

As noted at Page 9, above, Cascades, Inc. has historically directed the distribution of a "share" of "profits" twice a year, in June and December, to all employees with at least one year of seniority. (Tr. 131, 166, 208, 423) The Employer's two handbooks, with Region Three covering "Production" and "Maintenance", separately, both identify the profit sharing program as a "non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company." (Tr. 415-416); R. Ex. 8. At the Hearing, General Manager Normand LaPorte and Human Resources Manager Joe Zilbauer offered

[5] The Respondent respectfully requests that Your Honor take judicial administrative notice that the Board certified the Union in N.L.R.B. Case No. 03-RC-238346 on May 6, 2019, as is recorded in the case information found on the Board's website at www.nlrb.gov.

uncontroverted testimony that the profit sharing as a gift from the corporate office that is not guaranteed, and testified that when employees are on-boarded, they are advised that the profit sharing program is a corporate program that the Employer cannot control, and that it is treated as a gift. (Tr. 419, 420-421, 482) The Employer plays no role in creating or altering, and does not possess, the formula by which each employee's profit share is calculated, but is instead simply instructed by the corporate office as to the amount of money to provide to each of the Respondent's employees. (Tr. 423-424) The Respondent's role with regard to administration of the profit sharing plan is merely to "validate" that all employees are accounted for in a file received from the corporate office and that their salary information is listed correctly, so as to ensure that every employee on the list provided by the corporate office was employed during the pertinent period so as to be eligible to receive a profit share from the corporate office. (Tr. 425)

The amount of the profit share payment given to each employee has always varied from one payment to the next, and the percentage of the profit share received has always varied from employee to employee. (Tr. 132, 133, 166) Employees have received amounts ranging from $1,000 to $18,000. (Tr. 166-167, 209) Despite testimony offered by Gerald Cracknell, an employee presented by the General Counsel, that there were employees who knew the "exact formula", neither the Union representatives nor any of the employees who testified had any knowledge

concerning the specific calculation or formula by which each employee's amount of profit share was, or is now, determined. (Tr. 90, 92, 133, 154, 171, 196) Some of the employees who testified claimed that they could "kind of figure [..] out" or "ballpark" the amount of profit share they received, estimating based upon what they had received historically, the hours they had worked, and the profits of the mill for the same period. (Tr. 138-139, 169, 214) Similarly, the Record does not suggest in any manner that any member of the Respondent's management team possesses or has possessed knowledge of the formula for profit sharing, has authority to make any alteration to the profit sharing formula, or has possessed or possesses any information about either the formula or any changes to the formula.

Ron Warner, a Directing Business Representative of the Union, and some of the Bargaining Unit Employees testified that it was their understanding that the methodology for calculating each employee's profit share had changed twice in the past twenty years - most recently to begin taking into account the profits of some unspecified number of the other mills owned by Cascades, Inc. (Tr. 45, 106, 148, 167-168, 210-212) When those two changes were made, they were announced to employees. (Tr. 168-169, 213) More recently, however, both Warner and Richard Dahn, a Business Representative for the Union, confirmed that the Union had never been advised that any kind of change had been made to the profit sharing plan insofar as the June, 2019 profit share was concerned. (Tr. 42, 117) When employees

advised Warner that they believed a change was being made to the profit sharing plan, those employees were unable to identify the nature of any specific changes to the plan, but some employees claimed that their profit share "was less than what it was." (Tr. 43, 45) Warner admitted that the Union had no firsthand knowledge of whether the Employer's profits were higher or lower in June 2019 than in previous years, or how employees' profit share amounts compared to the amounts received in prior years. (Tr. 92-93) Similarly, Shawn Reed, an employee with nineteen years of service who testified for the General Counsel, admitted that he had no information about how many of the parent company's other facilities' profits were comingled for the purpose of calculating employees' profit share amounts. (Tr. 240-241) In fact, even LaPorte and Zilbauer testified that they are not provided with information about the profits of other mills involved in the employees' profit share, and exercise no control over the computation of each employees' profit share, or the overall profit sharing formula. (Tr. 382, 423-424, 425-426, 480-481)

In June of 2019, employees were provided with a memorandum from local management which indicated that they would be provided with their profit share after meeting with their direct supervisor. G.C. Ex. 21. Employees Cracknell and Reed, and another employee produced by the General Counsel, Randy Butski, all testified that, consistent with past practice, Production Supervisor Robert Pozzobon met with them and read to them from a document, the typed text of which mirrored

the memorandum provided to all employees. G.C. Exs. 21, 22. The employees claimed that Pozzobon then also read from a handwritten addition to the memorandum, which stated that the profit share in June 2019 was "adjusted" due to the "current conditions" and "current situation" at the Employer's mill. [6] (Tr. 141-142, 175-177, 221) Pozzobon also testified that he told the employees with whom he met that their profit share had been affected by the current situation at the mill – a statement that he read off of a handwritten statement provided to Pozzobon by Pozzobon's Manager, Pat Schamall. (Tr. 287, 288, 290-291). Finally, Pozzobon testified that he always relays to the employees who he meets with to distribute profit sharing that the profit share is a gift. (Tr. 295-296) Butski testified that his June 2019 profit share was "close to the same" as what he had been expecting, and Reed testified that he received roughly 89% of the amount he was expecting, though he claimed that his estimate was limited by the fact he was unable to obtain information

[6] On direct examination, Cracknell claimed that Pozzobon had, in response to Cracknell's question, stated that the "situation" was the Union, but upon review of his affidavit, admitted that Pozzobon referenced the Union "in a roundabout way" and may not have even used the word "union" during their discussion. (Tr. 141-142, 155-156) Butski also claimed that Pozzobon had referenced the Union as his opinion of the reason for a reduction in employees' June 2019 profit share. (Tr. 179) Reed testified that Pozzobon stated that there had been a change in employees' profit shares "due to the current situation", and that it was Reed's opinion, rather than anything Pozzobon said, that the "change" was the Union. (Tr. 221-222) During his testimony, Pozzobon expressly denied stating in any of the meetings that employees' profit shares were adjusted because of the Union. (Tr. 287)

about the mill's profits from the whiteboard in Marlowe's office, as he ordinarily had in the past. (Tr. 177, 223)

III. The Union's Requests for Information

On August 16, 2019, Warner, on behalf of the Union, sent the Employer a request for information concerning the profit share payments made to employees. (Tr. 44-45); G.C. Ex. 4. On August 29, 2020, Zilbauer wrote a letter responding to the request on behalf of the Employer, stating that, to the extent the Employer possessed the information requested by the Union, certain of the information requested was confidential and proprietary; and seeking an explanation of the relevance of the Union's requests. (Tr. 49, 95-96); G.C. Ex. 6. On August 26, 2019, Warner sent the Employer a second, identical request for information, which was not received by the Employer until August 29, 2019. (Tr. 48); G.C. Ex. 5. On September 6, 2019, Warner responded to Zilbauer's letter, setting forth the claimed relevance of the information that the Union had requested. (Tr. 51-52); G.C. Ex. 7. The Employer did not respond to the Union further thereafter, other than through the defense to the Charges, the Petition to Revoke the Administrative Subpoena which was filed contemporaneous with the Union's information requests, and eventually the Answer to the Second Consolidated Complaint. (Tr. 53)

Warner testified at the Hearing that the Union's information requests were submitted so that the Union could make proposals in bargaining concerning the

profit share received by employees. (Tr. 87) However, on September 18, 2019, several weeks after submitting their request for profit sharing information, the Union **actually made** a profit sharing proposal in its first proposal, even though they were not in receipt of the profit sharing information they had requested. Warner and Zilbauer testified, and the documentary evidence confirmed, that the Union's profit sharing proposal was taken word-for-word from the Employer's employee handbooks,[7] including the provisos that the profit sharing program would be non-negotiable and a wholly discretionary corporate program. (Tr. 82, 428); G.C. Ex. 3; R. Ex. 8. Warner testified at the Hearing that the Union's intent in making the proposal was that the Employer would continue administering the profit sharing program as had been done historically, with the sole addition of providing monthly profit reports to the Union. (Tr. 82-83)

IV. The Posting of Profit Information

During the Hearing, employees testified that, for the last 10 to 15 years, Controller Chris Marlowe had written the Employer's monthly mill profits on a whiteboard in her office every month. (Tr. 134, 170-171, 215) Employees were permitted to enter her office and observe the mill's monthly profits. (Tr. 134)

[7] The complete profit sharing text from the employee handbooks constitutes, verbatim, the Union's entire profit sharing proposal, except that the Union added one sentence in its proposal setting forth a requirement not contained in the employee handbooks that "Monthly profit reports will be posted and provided to the Union." See G.C. Ex. 3; R. Ex. 8.

Cracknell additionally testified that supervisors would also inform employees of the mill's profits, that employees discussed monthly profits internally, and that information about the profits could always be obtained by "word of mouth". (Tr. 134, 135, 138, 154)

Butski testified that the mill's profits were last displayed on the whiteboard in February of 2019. (Tr. 174) Reed testified that the profits were last displayed on the whiteboard in May of 2019. (Tr. 218) When Butski and Reed inquired about the whiteboard profits, Marlowe stated that she was no longer allowed to post them, but did not say why. (Tr. 172-173, 218) Cracknell testified that, sometime after the Union election, the mill's profits were no longer written on the whiteboard in Marlowe's office. (Tr. 136) He inquired of LaPorte as to why the profits were no longer written on the whiteboard, and was told that, because there was now a third party involved, the Employer could no longer share the numbers. (Tr. 151) Similarly, when Reed asked LaPorte why the mill's profits were no longer being displayed on the whiteboard, LaPorte responded that the Union had proven they could not be trusted with important information. (Tr. 224) Reed knew that the Union had distributed a flyer with personal information about LaPorte, and understood LaPorte to be referencing that flyer when they spoke. (Tr. 235)

Specifically, the flyer disseminated by the Union in April of 2019 attacked LaPorte, questioning his educational credentials, implying he had falsified his

resume, and disclosing his personal address, information about his personal finances, and the name of his wife. (Tr. 345, 349-351); R. Ex. 6. LaPorte testified that the flyer's allegations were untrue, and that he was "very disappointed" by the flyer, and became so sincerely emotional during his testimony about the flyer that Your Honor graciously chose to adjourn the Hearing for several minutes to allow LaPorte to regain his composure. (Tr. 346-347) Upon his return, LaPorte spoke to his acute reaction to talking about the flyer by explaining that, during a prior union organizing campaign at a previous employer, he had personal information about himself disclosed by a union and that, as a result, he, his wife and their children had to be guarded by private security. (Tr. 348) LaPorte advised management of the Employer's parent company, including Luc Pelletier, David Guillemette and Karen Jobin, of the flyer, and shared his concerns. (Tr. 352) In response, the Employer's parent company instructed the Employer to discontinue the practice of sharing confidential information at the facility. (Tr. 352-354) Thereafter, a memorandum was released by the Employer's management team on April 29, 2019, expressing, in relevant part, concern with how the Union had "taken sensitive information and used it to put together an adversarial campaign including personal attacks", and advising that, consequently, the Employer "may not be comfortable to share" "sensitive and private information", "such as profits". (Tr. 352-353); R. Ex. 5.

V. The May 2019 Layoffs

Both LaPorte and Zilbauer, testified that, by approximately mid-March of 2019, the Employer had produced inventory beyond storage capacity and sales for the Employer were slow, to a point where the Employer was storing excess product in multiple warehouses. (Tr. 317-321, 398-399, 401) LaPorte testified that other Cascades, Inc. mills, as well as competitor paper mills, also experienced similar "soft market" conditions. (Tr. 317) As a result, it became necessary for the Employer to engage in a temporary, two-week shutdown of one of the two production machines within the plant, from May 20, 2019, through May 31, 2019. (Tr. 124); G.C. Exs. 16, 18. A total of twenty employees were laid off from May 19, 2019 through May 25, 2019, and a total of eighteen employees were laid off from May 26, 2019 through May 31, 2019. (Tr. 205, 399); G.C. Exs. 15, 17, 18. The layoff was conducted in reverse seniority order. (Tr. 330, 399) All employees were returned to work in their former positions on or before May 31, 2019. (Tr. 38) Employees Cracknell, Butski and Reed all testified that such temporary shutdowns of similar scale and for similar, market-driven reasons had occurred in previous years, including in 1997, 2006 and/or 2007, and 2008. [8] (Tr. 130-131, 160-164, 207, 233)

[8] Union Business Representative Ronald Warner testified that he had no knowledge of the Employer conducting prior layoffs and made no effort to determine whether layoffs had been conducted previously, but admitted that an employee had told him that the Employer had "short shutdowns" in the past. (Tr. 34-35, 75)

On May 14, 2019, LaPorte sent Union Business Representative Rick Dahn an email, with a memorandum attached. (Tr. 111-112, 123, 316, 400); G.C. Ex. 15. The memorandum explained that, due to market conditions and consistent with past practice, some bargaining unit employees would be temporarily laid off over the course of the two-week shutdown, "to begin May 20, 2019." G.C. Ex. 15. Dahn shared the email with Union Business Representative Ronald Warner on May 14 or 15, 2019. (Tr. 32-34) Despite the Union's receipt of the Employer's notice on May 14, 2019, the Employer did not receive a response from the Union until May 22, 2019– two days after the start date of the layoff identified in the Employer's May 14th notice. The Union's response was dated May 17, 2019, but had been sent by regular mail. G.C. Ex. 2. The Union letter received by the Employer on May 22nd was from Warner to Zilbauer, offering to meet and discuss the layoffs on either May 28, 2019 or May 29, 2019, at the earliest. (Tr. 35-36, 126, 327-328,401-402); G.C. Ex. 2. When Dahn and Warner were questioned as to why they had waited so long to respond to the Employer's notice of the layoffs, Dahn responded that he "couldn't [say] exactly why", and Warner testified that he waited to respond until he had access to his letterhead. (Tr. 123, 78) Both Warner and Dahn further admitted that they made no efforts to call either Zilbauer or LaPorte after receiving the Employer's notice of the layoffs to discuss the matter. (Tr. 79, 123-124) When Dahn met with Zilbauer and LaPorte on May 29, 2019 to discuss another matter, LaPorte and

Zilbauer asked to discuss the layoffs, and Dahn responded that the layoffs could only be discussed with Warner. (Tr. 329, 404); G.C. Ex. 16. Dahn was then informed by Zilbauer and LaPorte that all of the employees who had been temporarily laid off would be returned to work by the following Sunday. [9] (Tr. 112-114); G.C. Ex. 16. [10] Dahn again suggested that the Employer would have to speak with Warner, specifically, about the layoffs. (Tr. 404); G.C. Ex. 16.

VI. Assignment of Custodial Work

Historically, in addition to using an independent contractor for custodial work, the Employer had employed one Janitor, named Steve Jackson. (Tr. 52-53, 339); G.C. Ex. 8. For at least ten years, Jackson had been primarily responsible for the custodial work associated with the production area of the mill, while the cleaning service was primarily responsible for the Employer's front offices and the completion of major cleaning projects. (Tr. 181, 184, 226, 370, 407, 455-456) The cleaning company also cleaned the production area during Jackson's tenure, at any time when Jackson was otherwise unavailable, or the work required additional crew. (Tr. 369-372, 409-410) Jackson retired in May of 2019, shortly after the Union

[9] Warner testified that Zilbauer relayed the same information to him during a telephone call sometime during the first week of June 2019. (Tr. 37-38)

[10] Respondent respectfully requests that Your Honor take Administrative Judicial Notice that May 29, 2019 was a Wednesday and that June 2, 2019, the following Sunday, was four days later.

election, and, thereafter, his position was not immediately filled by the Employer. (Tr. 57, 339, 368, 408) Instead, the Employer began to utilize the same independent contractor who had cleaned the front offices to clean the production areas previously assigned to Jackson. (Tr. 57, 66, 227, 339, 373, 409) LaPorte and Zilbauer testified that, historically, the Employer had not always filled every vacant position that had arisen, particularly "non-critical function positions", and that, in these particular circumstances, the Employer wished not to fill the vacancy because janitorial work was not the Employer's "core business". (Tr. 342, 408-409, 414)

On June 4, 2019, Warner sent the Employer a letter, stating the Union's position that the Employer was obligated to hire an employee to fill Jackson's position. (Tr. 57); G.C. Ex. 10. The Employer did not respond to Warner's letter until LaPorte and Zilbauer met with Warner on June 10, 2019, on which occasion Warner again shared the Union's view that the Employer was obligated to fill the vacancy left by Jackson. (Tr. 58-59) Zilbauer responded that he was not sure they were going to fill Jackson's position at that time, and that, even while Jackson had been employed, the Employer had used the independent contractor as needed to perform janitorial work. (Tr. 103, 411-413); G.C. Ex. 11. Warner again reiterated the Union's position in a letter sent to the Employer on June 21, 2019, to which the Employer did not respond. (Tr. 59-60); G.C. Ex. 11. Warner followed up his June 21, 2019 letter with an email to Zilbauer on June 27, 2019, to which Zilbauer

responded on July 2, 2019, stating that the Employer intended to post Jackson's position, "with the understanding we need to continue our discussion with the union about the position". (Tr. 60-61, 411-413); G.C. Ex. 12. Thereafter, the Employer did post Jackson's position, but did not fill it. (Tr. 61-63, 186, 229); G.C. Ex. 20. During the same period of time, the Employer pursued with the Union the concept of substituting another position for the open Janitor vacancy. (Tr. 342-343, 413-414) Specifically, the Employer offered to post and fill a vacancy for an Inbound Team Leader, a different bargaining unit position that was actually needed. (Tr. 414-415) The Union never responded with any interest in the Employer's proposals. (Tr. 415)

On September 5, 2019, Warner sent Zilbauer another email, questioning when Jackson's position would be filled. (Tr. 63, 341, 411-413); G.C. Ex. 13. Zilbauer responded to Warner on September 9, 2019, and stated that the Employer did not have a need to fill the position at that point in time, and was not obligated by past practice to do so. (Tr. 63, 341, 411-413); G.C. Ex. 14. Warner responded to Zilbauer by email on September 13, 2019, reiterating the Union's position, and threatening to file a Charge with the Board. (Tr. 64, 411-413); G.C. Ex. 14. Thereafter, Zilbauer responded to Warner by email on September 23, 2019, requesting that the Union identify any Board precedent that obligated the Employer to fill the vacancy, and reiterating that the Employer did not intend to fill the vacancy. G.C. Ex. 19. Warner

responded by email the same day, reasserting the Union's position, but failing to identify any applicable precedent. G.C. Ex. 19.

SUMMARY OF ARGUMENT

The Respondent respectfully submits that Your Honor should dismiss the Second Consolidated Complaint in its entirety.

Profit Sharing "Alteration" and Related Information Allegations

Insofar as the profit sharing allegations are concerned, Complaint never should have issued against the Respondent in the first place.

The Record makes painfully clear that the General Counsel has undertaken to prosecute the wrong party for the alleged profit sharing violations – Thus, the General Counsel has chosen to continue to pursue the Respondent in spite of the fact that the General Counsel lacked any proof since the very inception of the underlying unfair labor practice charges that the Respondent possesses any control over the sharing of profits at Niagara Falls. To the contrary, it is indisputable that the Record developed before Your Honor proves that it is the Respondent's corporate parent, Cascades, Inc., based in Kinsey Falls, Quebec, Canada, which possesses **sole** control over the subject profit sharing plan, the profit sharing formula, any changes which may ever be made to profit sharing, and all of the information concerning how individual shares of profit are calculated. Moreover, the Record shows that Cascades, Inc. is the only party which possesses and controls the material profit

sharing documents requested by the Union, and sought by the General Counsel's investigatory and trial subpoenas.

As for any alleged duty to bargain over profit sharing at Niagara Falls, none exists, for it is uncontracted in the Record that Cascade Inc.'s sharing of profits is and always has been bestowed as a gift – totally discretionary. Stated differently, the profit sharing which is the focus of the Second Consolidated Complaint is not a "term and condition of employment" with regard to which the Employer has any duty to bargain with the Union.

With regard to the posting of profit information, uncontroverted testimony establishes that it was Cascades, Inc. Management – not the Respondent – who determined that information about the Niagara Falls Mill's profits should no longer be displayed., and for a very *bona fide* reason at that.

Quite simply, the Record developed before Your Honor fails to establish any responsibility or culpability for any of the allegations related to profit sharing on the part of the Employer.

Thus, the Second Consolidated Complaint should be dismissed as concerns the allegations related to the Cascades, Inc. profit sharing plan.

The fact is that the General Counsel abused his authority and denied the Respondent its rights to due process and equal protection of the law by prosecuting the profit sharing allegations to begin with, despite having absolutely no supporting

evidence that the Respondent controlled the sharing of profits in June of 2019. The Record reveals that the Union, and by extension the General Counsel, did not possess, and could not have possessed, a scintilla of evidence regarding the details of the subject profit sharing plan. The Union merely harbored an unsubstantiated hunch that the profit sharing plan, by virtue of which a distribution occurred in June of 2019, had been "altered", based upon the pure conjecture of a few employees, and simply assumed that the Respondent must have been responsible.

Apart from the fact that the Record clearly establishes that the decision to stop posting the mill's profits was made by Cascades, Inc., rather than the Employer, the General Counsel failed to prove that the Employer ever even posted "profit sharing information", that the Employer had ever wholly curtailed access to that information, or that the profits were no longer posted in retaliation out of anti-Union animus.

With regard to the allegations of refusal to provide information about profit sharing, the profit shares are totally at the discretion of Cascades, Inc., which the Union's embraced by its own proposal to maintain the "status quo" submitted on the very first day of substantive bargaining as a key component of the Union's complete set of economic and non-economic proposals. As such, there is no duty to bargain over the profit sharing, and, even assuming arguendo there ever was, the Union has demonstrated that it didn't need any information to advance its proposal to maintain

the "status quo" and, having made the proposal, doesn't need the information to formulate a proposal now.

Similarly, the Record evidence does not establish that Pozzobon made any statements to employees that would have violated the Act.

Thus, all of the allegations related to profit sharing contained in the Second Consolidated Complaint are susceptible to dismissal.

The "Layoff" and "Subcontracting" Allegations

In the same vein, the remaining allegations of the Second Consolidated Complaint are equally meritless, and ought to be dismissed.

With regard to the May, 2019 layoffs, the Record clearly establishes that the Union waived its right to bargain by its failure to respond to the Employer's advance notice of the impending layoff in a timely manner, and by rejecting the Employer's attempt to bargain the very next time the parties met.

The Union's entire course of conduct relative to the then-impending layoffs evinces a lackadaisical attitude, rather than an abiding interest in exploring ways to avoid the layoff, altogether, or at least mitigate its effect.

With regard to the alleged unlawful subcontracting, the Employer had no duty to bargain with the Union concerning how it chose to manage custodial work after Jackson's retirement. But even if such a duty arguably existed, the Union's fixed

and intransigent opposition would have rendered any further bargaining futile, for the Union's position was a *fait accompli.*

Thus, for all the foregoing reasons, these additional allegations in the Second Consolidated Complaint are equally ripe for dismissal in their entirety.

ARGUMENT

I. The General Counsel Is Prosecuting a Respondent With No Control

As noted in the Summary of the Argument, the Record makes painfully clear that the General Counsel has undertaken to prosecute the wrong party – thus, the General Counsel has chosen not to pursue a Complaint against Cascades, Inc. - the Employer's parent company – which has been proven to possess sole control over the subject profit sharing plan, the formula for profit sharing, any changes made to profit sharing, and virtually all of the information concerning how profit shares are established and calculated. Cascades, Inc. is the only party that possesses and controls the documents requested by the Union, and sought by the General Counsel's subpoena, and the fact that Canadian law would prevent and bar the disclosure of the targeted information does not justify the General Counsel's unfair pursuit of these claims against the Employer.

From the outset, and despite more than sufficient notice, the General Counsel failed to join a necessary party in the instant case, and as a result, could not and did not prove responsibility or culpability on the part of the Employer for any of the

allegations contained in the Second Consolidated Complaint which implicate profit sharing. The Record establishes that Cascades, Inc. - the Employer's parent company – has sole control over the profit sharing plan, the formula for profit sharing, any changes made to profit sharing, and all of the pertinent information concerning how profit shares are calculated. Any decision to change the profit sharing plan is a corporate decision, over which the Employer exerts no control, and for which the Employer can therefore not be held liable. See Exxon Research Eng. Co. v. NLRB, 89 F.3d 228 (5th Cir., 1996). From the outset of the investigation of the Union's Charges, the Employer has repeatedly explained that it does not control the profit sharing plan, which was established and is maintained as a gift by Cascades, Inc. See R. Ex.1; G.C. Ex. 1(x-2). Furthermore, at the Hearing, both LaPorte and Zilbauer offered uncontroverted testimony as to the complete and total corporate control of the profit sharing plan. See (Tr. 382, 423-424, 425-426, 465-466 [11], 480-481) The fact of corporate control is additionally consistent with the testimony offered by the General Counsel's witnesses, who testified that they were told that the profit sharing plan was changed a few years prior to June of 2019 to incorporate and intermingle the profits of multiple mills owned by the same corporate parent – a change which obviously could not have been devised or

[11] Zilbauer's testimony establishes that David Guillemette, who is referenced by Zilbauer's testimony, works for the Employer's corporate parent. (Tr. 432)

implemented by the Employer, which is merely one of the mills incorporated into the profit sharing plan by Cascades, Inc. See (Tr. Tr. 45, 106, 148, 167-168, 210-212) Accordingly, it is patently obvious- and was from the outset - that the Employer is not liable for administration of, or changes to, the profit sharing plan. Had the General Counsel wished to issue a Complaint against Cascades, Inc., it could have done so. See NLRB Case-handling Manual §§ 10262, 10264.4. In lieu of such action by the General Counsel, it is legally impermissible to hold the Employer liable for actions it did not take and could not control, and therefore the profit sharing allegations of the Complaint must be dismissed.

Furthermore, Cascades, Inc. is the party that controls possession and provision of documents requested not only by the Union, but also by the General Counsel's subpoena, and the Record illustrates that Canadian law would prevent and bar the disclosure of that information. From the outset, the Employer has been clear in its communications with both the Union and the Board that Cascades, Inc., alone, possesses and controls the information sought by both parties. In response to the Union's information request, the Employer wrote, "**Even if** Cascades – Niagara Falls **were to possess**" (emphasis added) the information sought, the information would be confidential and proprietary. G.C. Ex. 6. Similarly, in response to the General Counsel's trial subpoena, the Employer explained that the General Counsel's demand for the profit sharing formula, for example, "would be found in documents

that cannot be divulged outside Quebec or Ontario, Canada, were they to exist in either or both of these Canadian provinces." R. Ex. 1, p. 23, FN 10. Indeed, the Employer's Petition to Revoke explained that documents requested that were controlled by Cascades, Inc.:

> would be prohibited from production pursuant [to] the Quebec Business Concerns Act CQLR, Ch. D-12, and the Ontario Business Records Protection Act, RSO 1990, Ch. B.19, which prevent the disclosure or transfer of "any document" or "any material" to any place outside of those provinces upon a requirement (including a subpoena) issued by a foreign authority, including an "administrative authority." CQLR, Ch. D-12, §2; RSO 1990, Ch. B.19, §1. Failure to comply with the requirements of these laws can subject a party to a finding of contempt and, in the case of the Ontario statute, imprisonment. CQLR, Ch. D-12, §5; RSO 1990, Ch. B.19, §§2, 3.
>
> R. Ex. 1, pp. 21-22, FN 9.

Thus, in order to resolve this threshold conflict of laws and jurisdictional issues, the General Counsel was presented with yet another reason why Cascades, Inc. constituted a necessary party to the instant litigation.

Additionally, it is clear that it was Cascades, Inc. – rather than the Employer – who determined that information about the Niagara Mills plant's profits would no longer be displayed. The Record establishes that the decision to stop posting the Niagara Falls mill's profits on the whiteboard in Marlowe's office was not made by the Employer, but rather by Cascades, Inc. Thus, in these circumstances, there is no legal theory in existing Board precedent which supports the attribution of retaliatory animus to the Employer, in violation of § 8 (a) (3), for a decision the Employer did

not make. Furthermore, there is absolutely no evidence in the Record to support a claim that any individual agent or representative of Cascades, Inc. (who, importantly and notably, was not even named as a Respondent in this case despite clear evidence that they controlled the profit sharing plan) made the decision to stop posting the mill's profits on the whiteboard in Marlowe's office for retaliatory reasons. In all of these regards, it is patently evident that Cascades, Inc. was a necessary party to this litigation. As a related matter, it is equally clear that the General Counsel could not and did not establish that the Employer had violated the Act, in circumstances where it had no control over the decisions made by Cascades, Inc. Accordingly, for all these reasons, the allegations of the Second Consolidated Complaint related to profit sharing must be dismissed.

Finally, in failing to name Cascades, Inc. as a Respondent in the instant case, the General Counsel has created a situation where, even if the Employer were found to have violated the Act by way of decisions that were entirely outside its control, the Record establishes that the Employer is in no position to comply with any remedy that Your Honor would recommend. See NLRB Case-handling Manual § 10264.4. Just as the Employer had no authority or power to resist the decisions of Cascades, Inc. with regard to the profit sharing plan, the possession and control of information about the profit sharing plan, or the posting of the mill's individual profits, nor is there any evidence that the Employer can override those corporate decisions in order

to comply with any remedy that is ordered. The Employer has no authority to unilaterally "un-alter" the profit sharing plan. The Employer has no ability to obtain nor authority to share information with the Union in violation of the cited Canadian blocking statutes. Finally, the Employer has no authority to rebuff corporate direction and resume the posting of mill profits. The General Counsel made no effort to prove otherwise, nor did the General Counsel name Cascades, Inc. as a Respondent, leaving the alleged violations of the Act contained in the Second Consolidated Complaint – even if they had been proven –impossible to remediate.

In light of this misdirected prosecution on the part of the General Counsel, the Second Consolidated Complaint must be dismissed.

II. The June 2019 Profit Sharing Payments Did Not Violate the Act

A. The General Counsel Lacked Authority to Issue Complaint

As noted in the "Summary of the Argument", above, the General Counsel abused its authority and denied the Employer its rights to due process and equal protection by prosecuting these allegations despite a total lack of supporting evidence. It is clear that the profit sharing allegations should never have been pursued, where the Union possessed nothing more than an unsubstantiated hunch to support its claim of an alteration, and by extension, the General Counsel failed to establish a *prima facie* case in support of the allegation.

The General Counsel has wholly failed to prove the Second Consolidated Complaint allegations concerning "alteration" of the profit sharing plan, and thus those allegations must be dismissed.[12] Furthermore, the Record, including the shocking lack of evidence marshalled by the General Counsel concerning the profit sharing allegations, raise serious concern over whether a complaint ever should have issued concerning the alleged "alteration" of the profit sharing plan, and whether the General Counsel abused his authority by issuing complaint in violation of the Employer's due process rights and entitlement to equal protection. The Act requires proof that a party has engaged in an unfair labor practice before a complaint is to be issued. See 29 U.S.C. § 160 (b); NLRB Rules & Regulations §§ 101.5, 101.6, 101.8 (Where evidence is insufficient to substantiate a charge, it should be withdrawn or dismissed; Complaint should be issued only where there is evidence of merit); See Also NLRB Case-handling Manual §§ 10122, 10260, 10262. Thus, from the outset of the General Counsel's investigation of the allegations, it should have been clear to the General Counsel that he required *some* evidence – really, *any* evidence – of the alleged "alteration" of the profit sharing plan in order to issue complaint.

[12] As requested at the Hearing before Your Honor, the Employer respectfully moves pursuant to §102.65 of the Board's Rules and Regulations to dismiss the allegations of the Second Consolidated Complaint which pertain to the profit sharing plan, for the reasons stated at the hearing and in this Post-Hearing Brief. See (Tr. 259-260).

The Record establishes that the General Counsel did not receive the requisite evidence from the Union, because the Union never possessed it. Warner testified that the Union did not know what formula was used to determine profit sharing amounts, or whether it had been altered in June 2019. Employees testified to their attempts at "ballparking" the amounts they would receive, but readily admitted that they lacked complete information about the formula that was used, and thus, could not say whether any change had been enacted. Furthermore, the Record effectively establishes that the General Counsel was, himself, without the requisite evidence, not having been able to obtain it from the Union, which is why the General Counsel chose at first to seek the evidence, including, *inter alia*, the formula behind the profit sharing plan and evidence of any changes that the General Counsel suspected may have been made to the formula, by way of an investigatory subpoena. See R. Ex. 1, Att. 2. The Region ultimately withdrew its investigatory subpoena, leaving the General Counsel right back where the case had started when the Second Charge was initially filed – without any evidence whatsoever to support a *prima facie* case. Finally, the General Counsel was put on notice – by, *inter alia*, the Employer's response to the investigatory subpoena, the Employer's response to the trial subpoena, the Employer's response to the Union's request for information, and the Employer's Amended Answer to the Second Consolidated Complaint – that Cascades, Inc., rather than the Employer, controlled the profit sharing plan. The

General Counsel made no effort to join Cascades, Inc. or otherwise establish in any way whatsoever that the Respondent maintained any measure of control over profit sharing.

Thus, it is clear that, when the Second Consolidated Complaint was issued, the General Counsel still lacked even the most basic evidence to support the allegations included in the Second Consolidated Complaint. In fact, the General Counsel confirmed this position at the Hearing, conceding that, if the Employer did not produce documents that would prove the allegations for him, the General Counsel "would have jack" to prove his case. (Tr. 80) In such circumstances, the Second Consolidated Complaint never should have issued containing the profit sharing allegations, and must now be dismissed in light of the prejudicial violation of the Employer's rights to due process and equal protection. See 5 U.S.C. § 554 (c). The General Counsel's massive unforced errors obligated the Employer to unnecessarily expend valuable time and resources to defend these baseless and wholly unproven allegations, and cannot be permitted to stand. [13]

[13] Contrary to the position taken by Your Honor during the Hearing, the argument raised by the Employer at Hearing and articulated in this Post-Hearing Brief does not constitute an improper or otherwise irrelevant attack on the investigation of the Union's Charges by the Region, but rather is a *bona fide* Affirmative Defense protesting the General Counsel's blatant abuse of prosecutorial discretion. See (Tr. 279)

B. The General Counsel's Case Fails on the Merits

The General Counsel asserts in in ¶ 8 (e) of the Second Consolidated Complaint that "About June 19, 2019, Respondent altered the employee profit sharing plan", alleges in ¶ 8 (g) that such an "alteration" is a "term and condition[] of employment" and a "mandatory subject[] for the purposes of collective-bargaining (sic)" and concludes in ¶ 8 (g) that, consequently, such "alteration" violated §§ 8 (a) (5) and (1) of the Act because the Respondent undertook the "alteration" without "affording the Union an opportunity to bargain with the Respondent with respect to [the "alteration"] and the effects of [the "alteration"]." As noted in the "Summary of Argument", above, the Respondent maintains that the Cascades, Inc. profit sharing plan is not a "term and condition of employment"; rather, it is a "gift" with regard to which Respondent had no duty to bargain with the Union. Respondent further asserts that the General Counsel has wholly failed to prove that either § 8 (a) (1) or (3) were violated in connection with the profit sharing plan.

As an initial matter, throughout the Hearing, the General Counsel continued to fall far short of proving a *prima facie* case that *any* change or alteration to the profit sharing plan or profit sharing formula had occurred. In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court held that unionized employers must refrain from making unilateral changes to employment terms, without first providing notice

and opportunity to bargain to the union. However, where an employer's action does not change existing conditions or alter the status quo, the employer does not violate § 8 (a) (5) of the Act. Id. at 746. Accordingly, the Board has long held that, where an employer follows a well-established past practice, there is no violation of §§ 8 (a) (1) and (5) of the Act. House of the Good Samaritan, 268 NLRB 236, 237 (1983). In this manner, regular changes in line with the *status quo* do not violate the Act. Westinghouse Electric Corp., 150 NLRB 1574, 1577 (1965).

In the case at bar, all the General Counsel managed to establish was that the employees called by the General Counsel believed that the amount of the profit share payment that each employee received in June of 2019 had varied from the amount of the profit share payment that each employee received in the past. This "change" however, is entirely to be expected, given the testimony of every witness that the amount of an employee's *profit* share will turn on the amount of *profit* – which, as the General Counsel admitted (Tr. 10), will vary for every six-month period, and has historically been wide-ranging (though the June 2019 payments to employees were, on average, higher than the December 2018 payments to employees. See (Tr. 166-167, 209) (Profit sharing payments have historically varied from $1,000 to $18,000); J. Ex. 2 (Variation in average profit share payment for all employees by pay period, June 2016 to 2019); J. Ex. 3 (Variation in profit share payments by pay period for select group of representative employees).

Despite the vague and ambiguous conjectures of some witnesses to the contrary, the General Counsel failed to prove that the profit sharing formula was in any way different in June of 2019 than it was in prior profit sharing distribution periods, or if there was any difference, what had constituted the difference and how it affected employees. All of the employees who testified were clear that prior changes to profit sharing were explicitly announced to employees in a group meeting - and that no changes were announced in this manner in connection with the June 2019 payments. Despite the generalized claims of witnesses like Warner, who claimed (on the basis of hearsay) that profit share payments were "lower than expected" (Tr. 11), it is entirely unclear whether those anonymous (and unproven) expectations were rooted in reality – particularly a reality that involved an incredibly soft market and slow spring turnaround, as testified to by LaPorte. Similarly, while Reed testified that his payment was lower than he had "guess-timated", he admitted that he did not have information about either the Employer's profits, or the profits of other mills, to calculate an accurate estimate. To the contrary, Butski testified that his June 2019 profit share was "close to the same" as what he had been expecting. (Tr. 177) Indeed, neither the Union nor any of the employees who testified had any knowledge concerning the specific calculation or formula by which each employee's amount of profit share ever was, or is now, determined, nor did the General Counsel develop any theories of his own to support his allegations.

In fact, if the evidentiary Record proves anything at all about the June 2019 payments, it is that they were, historically speaking, some of the highest payments employees had received, despite the soft market described without controversion by the Employer's witnesses. For hourly employees, the June 2019 payments were, on average, the second highest payments received over the course of the last three years and last seven pay-outs. J. Ex. 2. For salaried employees, the June 2019 payments were, on average, the third highest, only a few hundred dollars shy of the second-highest payments distributed in June 2018. J. Ex. 2. These trends are further exemplified by the payments received by individual representative employees, all of whom, in June 2019, received the second-highest payment they had received in the course of the last three years and last seven pay-outs. J. Ex. 3. Therefore, the Record made before Your Honor makes it abundantly clear that the General Counsel has failed to meet his burden of proof that the profit share was "altered", let alone in a negative or discriminatory manner, and thus the allegations concerning an "alteration" of the profit sharing plan must be dismissed.

Even if the General Counsel's evidence had been sufficient to establish any kind of change to the profit sharing plan, the Record clearly establishes that the profit share received by Respondent's employees is a gift, concerning which the Union had no right to bargain, and thus the Respondent could not have violated § 8 (a) (5) of the Act by failing to bargain over the Cascades, Inc. profit sharing plan. See Bob's

Tire Co., Inc., 368 NLRB No. 33 (2019) (Christmas bonuses paid to employees every year were gifts concerning which the employer was not obligated to bargain with the union.); Harvstone Mfg. Corp., 272 NLRB 939 (1984). The Employer's handbook identifies the profit sharing program as a "non-negotiable [...] discretionary corporate program which can be modified or reviewed at any time by the Company." At the Hearing, Pozzobon, LaPorte and Zilbauer all described the profit sharing as a "gift" that is not guaranteed. They further testified that when employees are on-boarded, and twice every year when employees are given their profit share, they are advised that the profit sharing program is a Cascades, Inc. program that the Employer cannot control, and is a gift to employees. Indeed, the profit sharing plan in the case at bar is akin to the Christmas bonuses paid by the employer in Bob's Tires: the amount of the payment is highly variable, and is linked to many non-performance related economic factors that have nothing to do with employees' work at the mill. Accordingly, even if the Record had established that there was a change to the profit sharing plan, it was not a change over which the Union was entitled to bargain, and for this additional reason, the allegations of the Second Consolidated Complaint must be dismissed.

Finally, the Second Consolidated Complaint's alleged violation of § 8 (a) (3) by way of an "alteration" to the profit sharing plan must also be dismissed. In order to prove a change made by an employer violated § 8 (a) (3) of the Act, the General

Counsel must prove not only that anti-union animus motivated the employer but also that the change in question had an adverse effect on employees. Yellow Ambulance Service, 242 NLRB 804, 810 (2004). In the case at bar, the General Counsel has not met his burden. First, there is no evidence of any adverse impact on employees. Second, there is absolutely no evidence of animus on the part of the Employer in the Record, and particularly not as concerns an alteration to the profit sharing plan. As explained *supra*, the Record convincingly establishes that the Employer does not control the profit sharing plan. Accordingly, even if there were any evidence of animus or retaliatory motive attributable to the Employer, that motive and / or intent could not have served as the basis for any alleged change, because the Employer did not make a change. Furthermore, setting aside for the moment the total lack of evidence of any change to the profit sharing plan, there is additionally no evidence of animus on the part of Cascades, Inc. – the only entity in a position to effectuate a change in their profit sharing plan - even if they had enacted a change to profit sharing. As a related matter, it is inappropriate for the Employer to be forced by the General Counsel into the position of having to defend against any actions taken by a wholly separate corporate entity – Cascades, Inc. - which the General Counsel consciously chose not to join as a party such that it could have had an opportunity to defend itself.

With regard to the related § 8 (a) (1) allegations, while the Record establishes that Pozzobon stated to employees that the profit sharing plan had been "affected" by the "current situation" at the mill, the Record in no way establishes that the "current situation" at the mill had anything to do with the Union or employees' concerted activity. Pozzobon explained that he was reading a prepared script, and did not testify to any knowledge of the intent of the individual who wrote the script. Furthermore, Pozzobon testified credibly that he made no mention of the Union to any employee with whom he met. It is equally, if not more likely, that the reference to the "current situation" at the mill was a reference to the soft market and the temporary layoffs that the mill had endured - in other words, a simple explanation that profits were down (which, coincidentally, would also explain Pozzobon's reference to an "adjustment" associated with lower mill profits).

Insofar as the § 8 (a) (3) allegation is concerned, Zilbauer's hearsay testimony that Cascades, Inc.'s Regional Manager David Guillemette [14] told him there would be a "change" to the June 2019 profit sharing payments "because of the Union's situation" (Tr. 266) is similarly vague. When Zilbauer's testimony is carefully studied, it is not at all probative of whether the "change" he believes Guillemette mentioned necessarily was a negative one – Thus, it is equally plausible any such

[14] The Employer respectfully moves to correct the transcript references, during LaPorte's testimony, to Guillemette as the "original manager" to "Regional Manager". See (Tr. 335, 352).

change may have benefitted employees, resulting in an increase in their payments, or may have been a neutral change, like a change in the manner that profit shares are electronically coded in the company's system now that the employees were unionized. Accordingly, the testimony does not establish that a material "change" was made, that the "change" had a negative impact on employees, or that the reference to the Union illustrated any animus or retaliatory intent. Ironically, what Zilbauer's testimony is undeniably probative of, and unmistakably serves to reinforce, is the Respondent's contention that Cascades, Inc. is the entity which would possess any information about any potential "alteration" of its profit sharing plan. Furthermore, the Record clearly establishes that the profit sharing plan is applied equally to all employees of Cascades, Inc. – both union and non-union, supervisory and non-supervisory – at the mill, and throughout the company. Thus, there could be no discriminatory motive against the Union, where there is no Record evidence to suggest that Union employees at the mill were treated any differently than any non-Union employee at the mill, or any other employee, union or non-union, throughout the entire company.

Thus, for all the foregoing reasons, the § 8 (a) (1) and (3) allegations in the Second Consolidated Complaint concerning the profit sharing plan must also be dismissed.

C. *The General Counsel's Request for Sanctions Must be Denied*

In connection with the allegation concerning the profit sharing plan, the General Counsel's request for sanctions related to Subpoena Duces Tecum No. B-1-173E8VR should also be denied. As described previously, the Region initially served an investigatory subpoena upon the Employer, in response to which the Employer filed a Petition to Revoke. R. Ex. 1, Att. 2. Thereafter, the Region withdrew its investigatory subpoena. See R. Ex. 1., Page Three Next, the General Counsel served a trial subpoena upon the Employer, seeking an expanded scope of records initially requested by the Region's investigatory subpoena. R. Ex. 1, Att. 1. The Employer filed a second timely Petition to Revoke, interposing a number of objections to production of the documents requested by the General Counsel, including the fact that certain of the documents were in the possession of wholly separate corporate entities in Canada, where provincial blocking statutes prohibited their disclosure, as well as the fact that the General Counsel was seeking, by way of the trial subpoena, virtually the same documents as were the subject of the Union's requests for information concerning the profit sharing plan, and which were the subject of certain allegations in the Second Consolidated Complaint. See R. Ex. 1.

On December 3, 2019, the first day of the hearing, Your Honor denied the Employer's Petition to Revoke in its entirety on the grounds that "vague allegations regarding Canadian law [...] regarding production only in the United States, a United

States facility are frivolous". (Tr. 16) The Judge determined that the issue was not a "serious conflict of law." (Tr. 24-25) The Judge then compared the application of Canadian law to the application of a state law protection, in which cases the Federal law controls. (Tr. 17-18) At that juncture, Counsel for the Respondent, Don T. Carmody, advised that the Employer did not possess, and did not control either possession of or provision of the information being sought by the General Counsel's subpoena. (Tr. 23) When Carmody raised the Board's holding in Electrical Energy Services, 288 NLRB 925 (1981), Your Honor distinguished the case on the grounds that the Union's requests for information were not the only issue involved in the trial. (Tr. 20) Virtually at the outset of the Hearing, and before a ruling had even been issued on the Employer's Petition to Revoke, the General Counsel requested the imposition of sanctions, pursuant to Bannon Mills, 146 NLRB 611 (1964), including the drawing of an adverse inference, the striking of all testimony elicited by the Respondent during the Hearing concerning the profit sharing plan, and the striking of all of the affirmative defenses raised by the Respondent's Amended Answer to the Second Consolidated Complaint. (Tr. 14-15) Your Honor stated that you would reserve ruling on the General Counsel's requests for various sanctions until after briefing, and permitted the Respondent to cross-examine and examine

witnesses concerning the profit sharing plan, and to present testimony and evidence in support of its affirmative defenses. [15] (Tr. 25-26)

Where an Administrative Law Judge determines that a party has refused to comply with a subpoena, the Board holds [16] that the Board has authority to impose sanctions, including those sought by the General Counsel in this case, in certain circumstances. McAllister Towing & Transportation Co., Inc., 341 NLRB 394, 396 (2004), *citing* International Metal Co., 286 NLRB 1106, 1112 FN 11 (1986). The Board derives its authority to impose sanctions from its "inherent interest in maintaining the integrity of the hearing process." Id. The party that issued the subpoena bears the burden of proving noncompliance warranting the imposition of sanctions. R.L. Polk & Co., 313 NLRB 1069, 1070 (1994). Sanctions are only

[15] It is worth noting that, if Your Honor were to now reverse the course taken at Hearing, and preclude testimony and evidence elicited by the Employer only after receipt of the parties' briefs, such a ruling would be highly prejudicial to the Respondent. It would be impossible for the Respondent to know, at this juncture, which Record evidence would be cut due to the sanctions, and which Record evidence would be allowed to stand. By extension, such circumstances would therefore render it impossible for the Respondent to successfully argue its case in this Post-Hearing Brief, because the Respondent would not be advised of which Record evidence it could rely upon to prove its case. Such an outcome, would, of course, violate the Respondent's rights to due process and equal protection.

[16] Some of the Circuit Courts question whether the Board possesses the authority to impose sanctions, where Congress explicitly reserved the authority to enforce the Board's subpoenas to the federal courts. See NLRB v. Int'l. Medication Systems, 640 F.2d 1110 (9th Cir. 1981). On the basis of those Courts' decisions, the Respondent respectfully submits that Your Honor is without authority to impose sanctions in the instant case.

appropriate in the face of a *deliberate* refusal to timely produce documents or witnesses. People's Transportation Service, 276 NLRB 169, 222 (1985). The deliberate nature of the refusal, and /or the imposition of an unfair evidentiary disadvantage by way of the refusal, are critical elements to a decision to impose sanctions. Id. The Board additionally looks for evidence that the requesting party has been prejudiced, and if it has not, the Board has found sanctions to be unwarranted. Sisters Camelot, 363 NLRB No. 13, 12 (2015); Addressograph-Multigraph Corp., 207 NLRB 892, 892 FN 2 (1973). Finally, the Board has reminded that Judges "be careful not to impose drastic sanctions disproportionate to the alleged noncompliance." Sisters Camelot, 363 NLRB No. 13, 11 (2015).

In the case at bar, sanctions are entirely inappropriate. As a threshold matter, the Employer maintains that, for all the reasons stated therein, including, *inter alia;* the General Counsel's abuse of authority in pursing the profit sharing allegations in the Second Consolidated Complaint in circumstances where the Union could not and did not present a *prima facie* case that the Act had been violated; the fact that the profit share is a gift concerning which the Union is not entitled to bargain; the compelling conflict of laws issues raised by the Canadian blocking statutes; and the Board's controlling precedent in Electrical Energy Services; the Employer's Petition to Revoke should have been granted in its entirety as concerns the information sought in Items (9) through (20) of the Subpoena. See R. Ex. 1. With

all due respect, Your Honor's assessment of the production issues associated with the conflict of laws and jurisdictional issues that arise as a result of the Canadian blocking statutes are anything but "frivolous". In fact, many other courts in the United States have grappled with these very issues in connection with the exact same Canadian blocking statutes. See, *e.g.*, Buttitta v. Asbestos Corp. Ltd., 2006 WL2355200; Ney v. Owens-Illinois, Inc., 2016 WL 7116015; Petruska v. Johns-Manville, 83 F.R.D. 32 (E.D. Pa. 1979); Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (S. D. South Carolina 1994). Furthermore, foreign blocking statutes have been held to block discovery in other United States courts. See Motorola Credit Corp. v. Uzan, 73 F. Supp. 397 (S.D.N.Y. 2015); Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517 (S.D.N.Y. 1987); Tiffany LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011). Accordingly, the Respondent's citation to the serious impact of the Canadian blocking statutes was hardly specious or fabricated in a novel attempt to oppose the contested Subpoena and should not have been dismissed by Your Honor out of hand, without thoughtful analysis.

Furthermore, there is no Board precedent to support Your Honor's distinction of Electrical Energy Services on the single basis that the requests for the profit sharing information were not the only trial issue. Specifically, in Electrical Energy Services, the employer refused to respond to a request for information served upon it by a union representing some of its employees. Id. The union filed an unfair labor

practice charge against the employer, alleging an unlawful refusal to provide information, and a complaint was issued by Region 28 of the Board. Id. Thereafter, the General Counsel for the Board served the employer with "a subpoena *duces tecum* attempting to obtain each and every document placed in issue by the complaint." Id. at 931. The Board affirmed the Administrative Law Judge's finding that the General Counsel was "attempting to use the subpoena *duces tecum* as a substitute for the Board order sought by the complaint", which the Administrative Law Judge found (and the Board affirmed) was an "improper [...] abuse of the subpoena power because it would undercut the statutory requirement for an unfair labor practice hearing where the ultimate issue to be decided is whether the General Counsel is entitled to the information in question." Id. at 931. The Administrative Law Judge therefore granted the employer's petition to revoke the subpoena duces tecum. Id. The Board's holding is straightforward and practical – if it did not exist, unions would always simply obtain information resisted by an employer by filing charges. The facts in the instant case are identical in every material respect to those presented by Electrical Energy Services, and there is no support in Electrical Energy Services or any other case for Your Honor's proposition that the Board's holding was limited to cases where failure to respond to the union's request for information was the only alleged unfair labor practice. Thus, for all these reasons, the Employer

respectfully requests that Your Honor reconsider your ruling on the Employer's Petition to Revoke, thereby rendering sanctions inapplicable.

However, even in circumstances where Your Honor believes your ruling on the Employer's Petition to Revoke should stand, sanctions remain entirely inappropriate in the case at bar. Immediately after receiving Your Honor's ruling on its Petition to Revoke, the Employer began producing documents responsive to the General Counsel's subpoena on the first day of hearing. See (Tr. 16) Most of those documents not produced on the first day of hearing were the documents the Employer did not possess. [17] Furthermore, the Employer advised, from the very outset in response to the General Counsel's subpoenas, that pertinent documents could not be produced regardless of the questions of control and possession, due to the strictures of the Canadian blocking statutes. Furthermore, before the close of the Hearing, the Employer made extra efforts, above and beyond what is required by Board law, to present the General Counsel with the information he sought, even when doing so meant culling through the data in its possession overnight in order to create summary reports for the General Counsel, as well as to provide the General

[17] As a related matter, the General Counsel bears the burden to establish that the Employer was in possession of the information that the General Counsel had subpoenaed – a necessary underpinning to the imposition of sanctions. See Dish Network Corp., 359 NLRB No. 108, 10 FN 31 (2013); North Hills Office Services, 344 NLRB 1083, 1084 FN 13 (2005); Shamrock Foods Co., 366 NLRB No. 117, 1 FN 1 (2018).

Counsel with four years of un-aggregated data from two different payroll systems in order to back up those summary reports. See (Tr. 428); J. Exs. 1-3. These efforts were acknowledged by Counsel for the General Counsel, who graciously stated that he appreciated the Employer's efforts to produce the documents, and thanked LaPorte for doing so during the Hearing. See (Tr. 486) At no point in time during the Hearing did the General Counsel raise the need for additional time or witnesses as a result of the Employer's document production. Both Your Honor and the General Counsel appeared satisfied, by the close of the Hearing, that the Employer had complied satisfactorily with the General Counsel's subpoena. By the close of the Hearing, it was equally clear that the General Counsel was in no way prejudiced by the manner in which the Employer's document production was eventually resolved. Nor did the General Counsel repeat his request for sanctions following the exhaustive attention paid to Subpoena compliance and introduction of Joint Exhibits 1 through 3. In such circumstances, where before the close of the Hearing the Employer had fully complied with all but two of the General Counsel's approximately thirty subpoena requests, and made efforts within their power to provide information to the General Counsel explaining its response to the final two requests, the imposition of sanctions is neither necessary nor appropriate.

Contrary to Your Honor's assertions on the Record, the Employer's inability to turn over documents that it did not possess was not "disingenuous" (Tr. 255-256),

and the Employer's related concern about the application of a foreign blocking statute was not "frivolous." (Tr.16) Quite simply put, the Employer could not produce what it did not possess, and the Record contains no evidence whatsoever that the Employer's representations that it did not possess the subject documentation were untrue. The Employer never made any effort to hide the fact that certain of the information sought by the subpoenas was in the possession of foreign corporate entities. To the contrary, this assertion was contained in the Employer's Petition to Revoke the General Counsel's trial subpoena (See R. Ex. 1); the Employer's Amended Answer to the Second Consolidated Complaint (See G.C. 1(x-2); and was made on the Record at the outset of the Hearing by the Employer's Counsel (See Tr. 23 – "I will advise Your Honor and Counsel for the General Counsel and the Union that we do not possess or control possession of the information that is being sought by the subpoena that was issued by the General Counsel.") Thus, it was clear from virtually the beginning of this case that the General Counsel should have inquired into who does possess the information the General Counsel mistakenly sought from the Employer, and could have subpoenaed the documents from those entities in possession. The General Counsel did not call the Employer's Custodian of the Records as a witness or otherwise inquire as to the identity of the party(s) who possessed the responsive documentation. Nor did the General Counsel ask Your Honor to issue any subpoenas designed to adduce such information. To blame and

sanction the Employer for the General Counsel's failure to do so is equally unsupported by precedent and logic. On the facts of this case, the imposition of sanctions would be purely punitive, and incidentally, punitive for no good reason, given the fact the Employer did not engage in any misconduct, whatsoever. Accordingly, for all these reasons, the General Counsel's request for sanctions should be denied.

III. The Handling of Information Requests Did Not Violate the Act

The General Counsel asserts in in ¶ 9 (c) of the Second Consolidated Complaint that "Since on or about August 16, 2019, Respondent has failed and refused to furnish the Union with the information requested by it and described above in paragraph 9(a)" and concludes in ¶ (12) that, consequently, it had violated §§ 8 (a) (5) and (1) of the Act. As a final matter related to the profit sharing plan, those portions of the Second Consolidated Complaint which allege that the Employer violated the Act by failing and / or refusing to provide information about the profit sharing plan to the Union upon its request must also be dismissed. As explained in the Summary of Argument, above, by the Union's own admission and proposal to maintain the "status quo", the profit shares are totally at the discretion of the Company. As such, there is no duty to bargain over them with the Union, and the Employer was not obligated to provide any information about them to the Union.

The Act requires an employer to provide requested information that is relevant to a union in fulfilling its duties as employees' collective bargaining representative, including information relevant to contract negotiation. Leland Stanford Jr. University, 262 NLRB 136, 139 (1982). In the case at bar, the Union is unable to establish relevance of the information concerning the profit sharing plan that it has sought from the Employer. First, the evidentiary Record in this case conclusively establishes that the profit share received by employees is a gift, and therefore not a subject concerning which the Employer would have a duty to bargain with Union. See Bob's Tire Co., Inc., 368 NLRB No. 33 (2019); Harvstone Mfg. Corp., 272 NLRB 939 (1984). The Record further proves that the Union itself knew the profit sharing plan was a gift to employees, because it possessed copies of the employee handbooks, which stated so, unambiguously. (Tr. 81-82) Since the Record before Your Honor establishes that the profit sharing in issue is a "gift" from Cascades, Inc., and thus not a "term and condition of employment, there is no duty to bargain with the Union over the Cascades, Inc. profit sharing plan, and since there is no duty to bargain over the Cascades, Inc. profit sharing plan, *a fortiori*, there can be no entitlement on the part of the Union to information it claims it needs to so bargain. Accordingly, the Union is not entitled to information about the gift of profit sharing for the purpose of bargaining.

Furthermore, by making a bargaining proposal, which Warner testified could have been independently accepted by the Employer the day it was made (Tr. 104-105), the Union illustrated that, regardless, it did not require any additional information about the profit sharing plan in order to formulate its bargaining proposal on the subject of Cascades, Inc.'s profit sharing plan. Accordingly, for all these reasons, the Second Consolidated Complaint allegations pertaining to the Union's requests for information must also be dismissed in their entirety.

IV. The Maintenance of Profit Information Did Not Violate the Act

The General Counsel asserts in in ¶ 8 (a) of the Second Consolidated Complaint that "About May 3, 2019, Respondent stopped displaying company profit sharing information for employees" and concludes in ¶ (11) that, consequently, the Respondent had violated §§ 8 (a) (3) and (1) of the Act. The allegations contained in the Second Consolidated Complaint concerning the Employer's alleged retaliatory cessation of posting "company profit sharing information" must be dismissed. As explained in the Summary of Argument above, the General Counsel failed to prove that the Employer ever posted "profit sharing information", that the Employer had ever wholly curtailed access to that information, or that the profits were no longer posted in retaliation for union activity or due to anti-Union animus.

Aside from the fact that the Record shows that the decision to discontinue the posting of information related to profit was made by Cascades, Inc., and not by the Respondent, the allegations, as they are literally contained in the Second Consolidated Complaint, have not been proven. On this ground alone, first and foremost, these allegations in the Second Consolidated Complaint must be dismissed. The Second Consolidated Complaint alleges that the Employer violated § 8 (a) (3) of the Act when it "stopped displaying company profit sharing information" in response to its employees' choice to unionize, and to "discourage" employees from engaging in concerted activities. G.C. Ex. 1(s), ¶¶ 8 (a), 8 (f). First, the General Counsel failed to prove that the Company *ever* displayed or otherwise made known to employees "company profit sharing information". To the contrary, all of the employees who testified for the General Counsel stated that the Employer displayed ***only*** the Niagara Falls mill's profits on the whiteboard in Marlowe's office, and both the Employer's witnesses and the General Counsel's witnesses testified that the distribution of profits took into account financial information of not only the Employer's corporate parent, Cascades, Inc., but also the financial information of an unspecified number of other affiliated but independent mills. Given this uncontroverted Record evidence, it is clear that information about the Niagara Falls mill's profits is *not* synonymous with "company profit sharing

information", the latter of which there is no evidence to suggest was either known by or ever shared by the Respondent.

Furthermore, even with regard to the question of the publication of the Niagara Falls mill's profits, the General Counsel has failed to prove that the Employer wholly curtailed access to that information by employees. Cracknell, a witness for the General Counsel, testified that there were multiple ways in which employees were able to, and did, ascertain information about the mill's profits - the whiteboard in Marlowe's office was one way, but supervisors would also share the mill's profits verbally with employees upon request, and information about the mill's profits circulated internally amongst employees. Notably, none of the employees who testified, nor LaPorte nor Zilbauer, ever testified that, at any point in time, a supervisor had refused, or was unable, to provide information about the mill's profits to an employee upon request. Nor is there evidence to suggest that, at any point in time, the Employer discouraged or punished employees from discussing amongst themselves what they knew about the mill's profits. Therefore, the General Counsel failed to prove that information about the mill's profits was no longer available to employees, and also failed to prove any substantive retaliatory change in the availability of information about the mill's profits to employees.

Rather, the Record shows that the corporate office made the decision to stop posting the mill's profits on the whiteboard on the basis of information received from

LaPorte about the inflammatory, defamatory flyer and the Union's untruthful attack on LaPorte, including the indiscriminate posting of his family's address and personal information[18]. Not only has the General Counsel failed to prove responsibility for the discontinuance of posting of profit information by the Employer, but furthermore, Cascades, Inc.'s directive to cease posting profits was legitimate in light of the flyer disseminated by the Union. The concerns that LaPorte expressed to Cascades, Inc. were about his safety and the irresponsibility of the Union in publishing personal information that could result in harm to his family, and – the parent company could have reasonably inferred - the confidentiality of the mill's financial information. The Union's flyer defamed LaPorte by accusing him of misrepresenting his educational background and publishing false information about his finances. The flyer included LaPorte's home address and the name of his spouse, both of which are private pieces of information that could lead to conflicts for LaPorte outside of work and involving his family. In these regards, the Union's flyer gave Cascades, Inc. every reason to believe that the Union could not be trusted with the mill's financial information.

[18] As a preliminary matter, it is inappropriate for the Employer to have been forced by the General Counsel into the position of having to defend the actions taken by a wholly separate corporate entity – Cascades, Inc. – in defending itself, in circumstances where the General Counsel consciously opted not to afford Cascades, Inc. with an opportunity to defend itself.

Furthermore, LaPorte's concern and resulting report to the corporate office do *not* illustrate any animus or retaliatory intent toward employees for seeking out representation (which began in August 2018 – nearly a year before the Employer stopped posting the mill's profits on the whiteboard in Marlowe's office), engaging in concerted activity (which would have occurred throughout the Union's organizing campaign), or the employees' decision to vote for the Union (which happened the month prior to the Employer's decision to stop posting the mill's profits on the whiteboard). See Mid-State, Inc., 331 NLRB 1372, 1383 (2000) (Supervisor's complaints to employees about union flyers he considered false and defamatory were not related to protected activities and did not prove animus.) To the contrary, LaPorte's concern, about which both he and Reed testified credibly, was focused *entirely* on the Union *qua* institution – more specifically, the Union's capacity and penchant for mischaracterizing and publicizing sensitive and / or confidential information. LaPorte's scorn for the Union's disreputable behavior – as opposed to any disdain for or animus toward any protected or concerted activity on the part of employees - is simply not actionable, and constitutes a legitimate business justification for the decision by Cascades, Inc. not to make the mill's profits readily available to the Union.

Accordingly, for all the foregoing reasons, the entirely unproven allegations concerning the posting of "company profit sharing information" in the Second Consolidated Complaint must be dismissed.

V. The May 2019 Layoffs Did Not Violate the Act

The General Counsel asserts in in ¶¶ 8 (b) and (c) of the Second Consolidated Complaint that the Respondent laid off approximately 38 bargaining unit employees for one week each, alleges in ¶ 8 (g) and (h) that the layoffs were a "term and condition[] of employment" and a "mandatory subject[] for the purposes of collective-bargaining (sic)" and were undertaken without "affording the union an opportunity to bargain", and concludes in ¶ (12) that, consequently, the layoffs violated §§ 8 (a) (5) and (1) of the Act. As set forth in the Summary of Argument above, the Employer maintains that the Union waived its right to bargain by its failure to respond to the Employer's notice of the impending layoff in a timely manner, and rejection of the Employer's offer to bargain the very next time the parties met.

The Record in the case at bar clearly establishes that the Employer did not violate the Act by instituting a temporary shutdown and related, temporary layoffs in May of 2019. Longstanding precedent generally obligates an employer to provide notice and a meaningful opportunity to bargain to the collective bargaining representative of its employees before enacting any unilateral change to the

substantial, material, and significant terms and conditions of employment for represented employees. NLRB v. Katz, 369 U.S. 736 (1962). Likewise, it has long been established that layoffs, whether temporary or permanent, constitute a change to terms and conditions of employment for represented workers. McGraw-Hill Broadcasting Co., Inc., 355 NLRB 1283 (2010). However, where an employer gives a union notice of planned change, and the union effectively refuses to meet with the employer or fails to act with due diligence in responding to the employer's notice, the union is found to have clearly and unmistakably waived its right to bargain over the decision and its effects. McGraw-Hill Broadcasting Co., Inc., 355 NLRB 1283 (2010); Bell Atlantic Corp., 336 NLRB 1076 (2001); Medicenter, Mid-SouthHosp., 221 NLRB 670 (1975); See Also Horizon Lines of Puerto Rico, Inc., 2012 WL 6755107, *adopted* 2013 WL 684672. Specifically, the Board has held that where a union "fail[s] to prosecute its right to engage in such discussion but content[s] itself with [...] subsequently filing a refusal to bargain charge", the union has waived its right to bargain. American Buslines, Inc., 164 NLRB 1055, 1056 (1967).

In this case, the Employer provided the Union with a timely advance written notice of its need to engage in a two-week shutdown, and related temporary layoffs, by sending an email and memorandum to Dahn on May 14, 2019. The Union squandered the valuable days between notification and its May 17, 2019 response – sent by "snail mail" and not received by the Employer until May 22, 2019 - for no

explicable reason. Under oath, Warner and Dahn could offer nothing more than faltering testimony that they wanted to put the response on letterhead as an explanation for the Union's delay. Furthermore, when the Union *did* finally respond to the Employer's notification of the temporary shutdown and related temporary layoffs, the first dates upon which they made themselves available to discuss the shutdown and layoffs were May 28 or May 29, 2019 – fourteen days after notification of a two-week shutdown; twelve days after their response; and virtually contemporaneous with what the Union *already knew* would be the ***end*** of the shutdown and the return of the represented employees to their positions. Finally, when the Employer met with Dahn on May 29, 2019, and sought to discuss the layoff, Dahn demurred, stating that the Employer could only speak with Warner (a condition on negotiations which was never explained by the Union) about the layoffs, thereby further preventing any conversation about a shutdown and temporary layoff that were now virtually completed.

By responding – or more accurately, failing to respond – in the manner that it did, the Union clearly and unmistakably waived its right to bargain concerning the decision to partially shut down the mill and temporarily lay off employees. The Union's failure to deliver a response to the Employer for eight days, coupled with the Union's request therein to meet when the layoff would be ending and employees would be on the eve of returning to their jobs, constitute a clear and unmistakable

relinquishment of the Union's statutory right to participate in negotiation concerning the shut down and the resulting temporary layoffs. The Union further illustrated its intent to waive its right to bargain the Employer's decision and its effects when the *Employer proactively* raised the issue of the layoffs with the Union, and the Union (*via* Dahn) refused to discuss the layoffs with the Employer. The Employer in this case made every effort to engage the Union, but cannot be held responsible for the Union's failure and refusal to participate in discussions with the Employer. Accordingly, because the Union clearly and unmistakable waived its right to bargain over the temporary May 2019 layoffs, the allegations contained in the Second Consolidated Complaint related to those layoffs must be dismissed in their entirety.

VI. The Assignment of Custodial Work Did Not Violate the Act

The General Counsel asserts in in ¶ 8 (d) of the Second Consolidated Complaint that "Since about May 2019, Respondent subcontracted bargaining unit work", alleges in ¶ 8 (g) that such an "subcontracting" is a "term and condition[] of employment" and a "mandatory subject[] for the purposes of collective-bargaining (sic)" and concludes in ¶¶ 8 (h) and (12) that, consequently, the "subcontracting" violated §§ 8 (a) (5) and (1) of the Act because the Respondent undertook the "subcontracting" without "affording the Union an opportunity to bargain with the Respondent with respect to [the "subcontracting"] and the effects of [the "subcontracting"]." As set forth in the Summary of Argument, above, the Employer

maintains that it had no duty to bargain with the Union concerning how it chose to manage custodial work after Jackson's retirement. But even if such a duty existed, the Employer asserts that the Union's fixed and unmoving position on the subject would have rendered any further bargaining futile, for the Union's position was a *fait accompli.*

As noted above, an employer is obligated by the Act to provide notice and a meaningful opportunity to bargain to the collective bargaining representative of its employees before enacting any unilateral change to the material, significant terms and conditions of employment for represented employees. NLRB v. Katz, 369 U.S. 736 (1962). When an employer's actions are consistent with its established past practice, however, the employer has not made a unilateral change, and thus has no obligation to provide notice to, or bargain with, the collective bargaining representative of its employees. Mike-Sells Potato Chip Co., 368 NLRB No. 145 (2019), *citing* Raytheon Network Centric Systems, 365 NLRB No. 161 (2017). Furthermore, an employer has no obligation to bargain over "a change in the scope and direction of the enterprise". First Nat. Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Specifically, where the change at issue "alter[s] the Company's basic operation", and "to require the employer to bargain about the matter" would "significantly abridge his freedom to manage the business", an employer is not required by the Act to give notice or bargain over the decision. Fibreboard Paper

Products Corp. v. NLRB, 379 U.S. 203, 214 (1964). Finally, in circumstances where a party has made clear that they have made up their mind concerning a subject, that they have no intention of engaging in meaningful bargaining, and that bargaining will be futile since the party's position constitutes a *fait accompli*, that party's position is "inconsistent with the duty to bargain". Brannan Sand & Gravel Co., 314 NLRB 282 (1994); Ciba-Geigy Pharmaceuticals, 264 NLRB 1013 (1982). Echoing this sentiment, the United States Supreme Court has recognized that "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." NLRB v. American Nat. Ins. Co., 343 U.S. 395, 404 (1952).

In the instant case, the Employer acted in a manner wholly consistent with its past practice in two highly relevant regards. First, the uncontroverted testimony elicited from LaPorte and Zilbauer at the Hearing proves that, historically, the Employer has not always posted, nor always filled, every position vacated at the mill. See Also, G.C. Ex. 14 ("It is not the policy of Cascades - Niagara Falls to absolutely fill any and all vacancies.") Second, the evidentiary Record, including the testimony of the General Counsel's employee witnesses, makes clear that the Employer has a long history of utilizing independent contractors to perform janitorial work, including the specific work most often performed by Jackson before his retirement. Under these factual circumstances, the decisions not to post or fill

Jackson's position immediately or at any point after his retirement were consistent with the Employer's past practice, and thus did not constitute a unilateral change in violation of the Act. Furthermore, the Employer's historic use of independent contractors to perform janitorial work, including the work that Jackson had performed while employed, was also wholly consistent with the Employer's past practice, and for this separate but related reason, the Respondent's determination not to fill Jackson's position with another employee did not violate the Act.

Even if the Respondent had not conclusively established that its use of independent contractors to perform janitorial work after Jackson's retirement was consistent with established past practice, longstanding Board precedent authorized the Employer to move forward with the alleged "change" unilaterally. As in First National Maintenance, the uncontroverted testimony of LaPorte and Zilbauer illustrates that the Employer's choice to continue using an independent contractor, rather than hiring a staff employee of the mill, to perform janitorial work, was an express decision "to go out of the business of [...] janitorial services". (Tr. 270) See Also (Tr. 414) ([T]his isn't our core business; our core business is making paper, not cleaning bathrooms.") Though the change involved only one position, it represented a fundamental change in the services rendered by the Respondent's work force , and thus a change in the scope and direction of the Employer's enterprise - by opting not to fill the Janitor position, the Employer was shutting down the entire line of

janitorial services which it had previously deployed. Accordingly, as the facts of the "change" mirror First National Maintenance, the Employer was under no obligation to bargain with the Union over the decision to cease the operation of janitorial services.

Finally, even assuming *arguendo* that the Employer would have had an obligation to bargain with the Union over its decision not to fill Jackson's position, and to continue instead using independent contractors to perform janitorial services at the mill, the Union's bargaining position, as articulated on multiple occasions by Warner, illustrated that bargaining would be fruitless, in light of the Union's fixed position. Despite being under no obligation to do so, the Employer expressed willingness to bargain with the Union over the concept of a "job for a job" - namely, the addition of a bargaining unit position in a job classification that the mill actually *needed*, in place of the filling of the custodial position. (Tr. 342-343) Warner repeatedly articulated, in writing and verbally, the Union's intransigent position that the Employer *must* hire a bargaining unit employee to fill the position, and that the Union would accept no other outcome. See G.C. Exs. 10, 11, 12 ("I was very clear [...] that this Janitor position is a Union job [...] I made it clear to you this is a Union position.", 13 ("We were clear we need the job (Janitor) posted and filled in the immediate future."), 14. During his testimony, Warner clearly reiterated the Union's unyielding position, stating, "[T]he Company was trying to offer a job for a job, you

know, a different job. But this concern here was - this custodial position was a union position and we wanted that position filled [...] What I wanted was this job filled [...]". (Tr. 101) See Also, (Tr. 103) ("I wanted that job filled. That was a bargaining unit position. I was very clear [...] about that.") In these circumstances, bargaining would have been a *fait accompli*, inasmuch as the Union made clear it would never yield – a position wholly incongruous with its bargaining obligations under the Act, even assuming the Respondent had a concomitant obligation.

Accordingly, for this reason, and for all the other reasons stated above, the allegations contained in the Second Consolidated Complaint concerning Jackson's position and the Employer's use of subcontractors must be dismissed.

CONCLUSION

For all the reasons stated in this Post-Hearing Brief, the Respondent respectfully requests that the Second Consolidated Complaint be dismissed in its entirety.

Respectfully Submitted,

_____/s/_____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cascades Containerboard Packaging-Niagara, A Division of Cascades Holdings, US, Inc.	Case 03-CA-242367 03-CA-243854 03-CA-248951
and	
International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on all parties or their counsel of record by serving a true and correct copy at the e-mail addresses listed below:

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Respectfully submitted,

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